



**City of Bellevue
Development Services Department
Land Use Staff Report**

Proposal Name:	FANA Land Use Code Interpretation
Proposal Address:	320-350 106th Avenue
Proposal Description:	Applicant seeks formal interpretation of the Land Use Code (LUC), Part 20.30K LUC, regarding the manner and requirements, if any, for utilizing floor area available from a currently nonconforming, future-phased portion of a Master Development Plan (MDP) to a first-phased portion. Specifically, the applicant seeks confirmation that under LUC 20.25A.040 and other relevant sections of the LUC, such use of Floor Area Ratio (FAR) does not actually “change” the nonconforming site conditions of the future-phased portion and therefore does not require bringing the site nonconformities in this future-phase portion into conformance.
File Number:	19-131714-DA
Applicant:	John C. McCullough of McCullough Hill Leary, PS, on behalf of FANA Group of Companies
Decisions Included:	Interpretation of the Land Use Code (Process II, Part 20.30K LUC)
Planner:	Trisna Tanus
State Environmental Policy Act Threshold Determination:	EXEMPT
Director’s Decision:	Interpretation of the Land Use Code Michael A. Brennan, Director Development Services Department <i>Elizabeth Stead</i> <hr/> Elizabeth Stead, Land Use Director Development Services Department
Application Date:	December 23, 2019
Notice of Application Publication Date:	January 23, 2020
Decision Publication Date:	June 11, 2020
Project Appeal Deadline:	June 25, 2020

For information on how to appeal a proposal, visit the Development Services Center at City Hall or call (425) 452-6800. Appeal of the Decision must be received in the City’s Clerk’s Office by 5 PM on the date noted for appeal of the decision.

**Interpretation of the Director
Bellevue File No. 19-131714-DA**

I. INTRODUCTION

The Applicant, FANA Group of Companies (FANA), owns and is currently in the process of developing real property located at 320-350 106th Avenue NE and 10655 NE 4th Street in Bellevue, Washington, King County Parcel nos. 154410-0324, 154410-0329, and 154410-0323 (the “Property”). FANA has submitted applications for an MDP that includes all three properties and an Administrative Design Review (ADR) for Phase 1 of the MDP. Phase 1 of the MDP is located at 320-350 106th Avenue NE; and Phase 2 is located at 10655 NE 4th Street. FANA seeks utilization of FAR from a currently nonconforming Phase 2 portion for the Phase 1 portion without bringing the site nonconformities of the Phase 2 portion into conformance with the LUC.

Summary of the Interpretation Request:

FANA seeks an interpretation regarding the manner and requirements, if any, of utilizing FAR available from a currently nonconforming Phase 2 (future-phased) portion for the Phase 1 (first-phased) development. FANA wishes to confirm that LUC 20.25A.040 and other relevant sections of the LUC do not consider utilization of FAR as development and a “change” to that nonconforming site requiring bringing the site nonconformities into conformance.

Short Answer:

The LUC considers the utilization of FAR of a site as development of the site. FANA’s intended utilization of available Phase 2 FAR is *development* and a fundamental change of that entire site. A nonconforming site may be changed only if the change conforms to the current and applicable code. LUC 20.25A.040.C. As such, the development and fundamental change of the entire Phase 2 site requires bringing all Phase 2 site nonconformities into conformance at the time this change occurs.

It is well-settled that nonconforming uses and sites are uniformly disfavored. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6-8, 959 P.2d 1024 (1998). A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. *Id.* at 7 (citing *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952)). The Washington State Supreme Court has consistently and repeatedly acknowledged the desirability of eliminating such nonconformities, and zoning ordinances, like LUC 20.25A.040, may provide for termination or cessation of the nonconforming status through reasonable amortization provisions. *Id.* at 7-8; *State ex rel. Miller*, 40 Wn.2d at 220, 242 P.2d 505 (“It was not and is not contemplated that preexisting nonconforming uses are to be perpetual”); *Keller v. City of Bellingham*, 92 Wn.2d 726, 730–31, 600 P.2d 1276 (1979) (“the severity of limitations in phasing out [nonconformities] is within the discretion of the legislative body of the city”); *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 217, 492 P.2d 1374 (1972) (“phasing out a nonconforming use ... is the desirable policy of zoning legislation” and is “within the discretion of the legislative body of the city or county.”)

FAR is a measure of development intensity that, within a phased development, may be utilized and allocated across phases. LUC 20.25A.020.A. However, FANA proposes to utilize Phase 2 development intensity while simultaneously allowing existing Phase 2 nonconformities to continue indefinitely. As explained below, FANA's desire to develop and change a nonconforming site without bringing that site into conformance with current code is inconsistent with LUC 20.25A.040.C, well-settled common law, and applicable City goals and policies.

II. INTERPRETATION

A. Background.

The Property is located in Downtown-Office 2 South (DT-O-2-S) Land Use District. It contains three tax parcels, totaling 2.08 acres. On November 22, 2019, FANA submitted applications for an MDP to build a 17-story office tower under Phase 1 and a 7-story office tower under Phase 2 (File No. 19-130395-LP). At the same time, FANA also submitted an ADR application for Phase 1 (File No. 19-130426-LD).

Phase 1 of FANA's MDP application is currently developed with low-rise office buildings, which are planned to be demolished as part of Phase 1 development and the submitted ADR. Phase 2 is currently developed with a nine-story office building (Key Bank Building), which is planned to be retained in its current condition during Phase 1 and redeveloped at some unknown future date.

For this MDP application, FANA plans to utilize the FAR available in the nonconforming Phase 2 site area for its Phase 1 development. FANA's first MDP and ADR submittals do not include any site improvements in its Phase 2 site, claiming that the conformance requirements in LUC 20.25A.040 are not applicable unless and until physical changes to the Phase 2 site occur.

During review of FANA's MDP and Phase 1 ADR proposals, the City directed FANA is to remedy the Phase 2 site nonconformities concurrent with its Phase 1 development. This direction is based on the City's interpretation that LUC 20.25A.040.C applies to FANA's proposal. Utilization of available FAR is development that fundamentally changes the entire site, and as a result, FANA is required to bring its nonconforming Phase 2 site into conformance with the current and applicable code.

FANA is proceeding in its MDP and Phase 1 ADR consistent with the City's direction and is including Phase 2 site improvements with its Phase 1 development. However, FANA has submitted this interpretation request in order to revert to FANA's first submittals, which assume that LUC 20.25A.040 and other relevant sections of the LUC do not consider utilization of FAR as development and/or fundamental change to the entirety of the site requiring conformance.

B. Applicable Regulatory and Code Provisions.

1. General Zoning Authority.

The City derives its zoning authority from its police powers granted under the Washington State Constitution, Art. XI, Sec. 11. Zoning is the legislative division of a community into areas within

which only certain designated uses of land or structures are permitted. In Bellevue, each property is classified into a Land Use District and is subject to applicable LUC requirements. LUC 20.10.050. For Downtown, the charts in LUC 20.25A.050 provide the uses allowed in each Downtown Land Use District. Further, the dimensional requirements applicable for each Land Use District and Perimeter Overlay in Downtown are specified in LUC 20.25A.060. The Downtown Code also includes LUC 20.25A.040, which properly provides for reasonable termination or cessation of undesirable nonconforming uses, structures, and sites. See, *Rhod-A-Zalea & 35th, Inc.*, 136 Wn.2d at 6-8, 959 P.2d 1024.

2. Purpose of an Interpretation of the Land Use Code.

LUC 20.30K.120 provides that an interpretation of the provisions of the LUC clarifies conflicting or ambiguous wording, or the scope or intent of the provisions of the Code. Additionally, LUC 20.30K.120 states that a request for such interpretation must relate to a specific site, land use district, use or application within the City of Bellevue and the interpretation may not be used to amend the LUC.

3. Nonconforming Provisions Generally and for Downtown Bellevue.

The Washington State Supreme Court explained the basis for the City's treatment of nonconformities as follows:

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use.

Rhod-A-Zalea & 35th, Inc., 136 Wn.2d at 7, 959 P.2d 1024.

State law does not regulate nonconforming uses, structures, or lots. Local jurisdictions are free, within certain constitutional limits, to establish their own standards for regulation of these nonconforming situations. Neither the Supreme Court nor the City contemplates that preexisting nonconformities are to be perpetual, or that such a result would be desirable. *Id.* (citing *State ex rel. Miller*, 40 Wn.2d at 220, 242 P.2d 505; *Keller*, 92 Wn.2d at 730–31, 600 P.2d 1276; *Bartz*, 80 Wn.2d at 217, 492 P.2d 1374).

In the LUC, nonconformities are defined in LUC 20.50.036. A nonconforming site is defined as “a lot which does not conform to site development regulations, including but not limited to, the landscaping, parking, fence, driveway, street opening, pedestrian amenity, screening and curb cut regulations of the district in which it is located due to changes in Code requirements, condemnation or annexation.” LUC 20.50.036.

For Downtown Bellevue, Part 20.25A LUC establishes the requirements, standards, criteria, and guidelines that apply to development and activity within Downtown Land Use Districts. Additionally, the provisions of the LUC, other development codes, the City development

standards, and all other applicable codes and ordinances apply to development and activities in Downtown.

Part 20.25A LUC was adopted on October 26, 2017, and replaced the previous 30-year-old Downtown Code. Thus, LUC 20.25A.040 provides updated and important requirements for nonconforming uses, structures and sites within Downtown; and these requirements apply to existing development and new proposals in Downtown Bellevue, including sites or structures permitted under the former code.

Nonconformities are allowed to continue indefinitely if there is no change to the use, structure, or site. LUC 20.25A.040; *see Rhod-A-Zalea & 35th, Inc.*, 136 Wn.2d at 7, 959 P.2d 1024. However, where the use, structure, or site is proposed to be expanded or changed, then the proposal may only be approved if it complies with LUC 20.25A.040. Specific to this code interpretation request, “a nonconforming site may not be changed unless the change conforms to the requirements of this Code...” LUC 20.25A.040.C.1. Changes, such as repairs, remodels, and expansions, to any structure located on a nonconforming site must also comply with scope, size, value, and time limitations in the LUC, or else the entire site must comply with the site development provisions of the LUC. LUC 20.25A.040.C.1 – 5.

4. Other Relevant LUC Provisions.

Part 20.25A LUC contains definitions specific to Downtown Land Use Districts and are important to consider in this interpretation request.

DT – Floor Area Ratio (FAR): A measure of development intensity equal to the gross floor area, excluding parking and mechanical floors or areas, divided by the net on-site land area in square feet. Net on-site area land includes the area of an easement and public right-of-way as provided in LUC 20.25A.070.C.

DT – Project Limit: A lot, portion of a lot, combination of lots, or portions of combined lots treated as a single development parcel for purposes of the Land Use Code.

DT – Site: Refers to the total land area (measured in square feet or acres), within the project limit. LUC 20.25A.020.

Additionally, the following general LUC definitions are also relevant to this request.

Development. All structures and other modifications of the natural landscape above and below ground or water, on a particular site. For the purposes of Part 20.25E LUC, regulation for the Shoreline Overlay District, a different definition is used. See “Shoreline Development” in LUC 20.25E.280. LUC 20.50.016.

Nonconforming. A use, structure, site or lot which conformed to the applicable codes in effect on the date of creation but which no longer complies because of changes in Code requirements or annexation.

Nonconforming Site. A lot which does not conform to site development regulations, including but not limited to, the landscaping, parking, fence, driveway, street opening, pedestrian amenity, screening and curb cut regulations of the district in which it is located due to changes in Code requirements, condemnation or annexation.

Nonconforming Structure. A structure which does not conform to the dimensional regulations, including but not limited to, setback, height, lot coverage, density and building configuration regulations of the district in which it is located due to changes in Code requirements or annexation. For structures not conforming to Building Code requirements, see UBC Section 104.

Nonconforming Use. The use of a structure or of land which does not conform to the regulations of the district in which the use exists due to changes in Code requirements or annexation. LUC 20.50.036.

C. Analysis.

1. Utilization of FAR from a Nonconforming Site Is Considered Development and a Fundamental Change to that Entire Site.

Utilization of available FAR is equivalent to development of that site. For Downtown, DT – FAR is defined as a “measure of development intensity equal to the gross floor area...divided by the net on-site land area in square feet.” LUC 20.25A.020 [emphasis added]. The available FAR dictates how much development, defined as “structures and other modifications of the natural landscape above and below ground or water,” a property owner may place on their site. LUC 20.50.016.

In its request, FANA wants to utilize available FAR from one phase (Phase 2) for development of another phase (Phase 1). FANA states that the utilization of Phase 2 FAR in Phase I development would not add development intensity to Phase 2, and instead actually would “*reduce[]* development intensity to the Phase 2 portion of the site.” FANA Request, p. 5. At the same time, FANA also points out that allowable FAR is “a development right, not a requirement.” *Id.* Therefore, according to FANA, utilizing FAR should not be considered development at all.

While FANA is correct that the utilization of available Phase 2 FAR in its Phase 1 development will reduce the development capacity, i.e. development right, of the Phase 2 site, the outcome is not net-neutral. Rather, this reduction is a fundamental change to the entire Phase 2 site. Available FAR of a site is a function of the physical area of that site and a necessary ingredient of development. Simply put, if there is no available FAR on a site, no additional development can take place.

Here, FANA is proposing to permanently reduce the development right for its Phase 2 site. A potential result is that, with its development capacity used up or diminished, the existing nonconforming structure/development will remain in place indefinitely. There will simply be less incentive to redevelop this existing nonconforming site, perpetuating the nonconformity. Alternatively or at some future time, Phase 2 will be improved at a reduced development intensity/FAR. Thus, if FANA chooses to utilize available Phase 2 FAR during its Phase 1

development, such utilization is equivalent to development and a fundamental change to that entire Phase 2 site.

2. Development and Fundamental Change of the Entire Nonconforming Phase 2 Site Requires Bringing the Site Nonconformities into Conformance When this Development Occurs.

FANA is required to bring its Phase 2 site nonconformities into conformance with the current and applicable code when it develops and fundamentally changes the Phase 2 site. The LUC provides that a nonconforming site may be changed only if the change conforms to the current and applicable code. LUC 20.25A.040.C. These LUC provisions are based on the well-settled zoning and land use policy in the State of Washington that nonconforming uses and sites are uniformly disfavored. *Rhod-A-Zalea & 35th, Inc.*, 136 Wn.2d at 6-8, 959 P.2d 1024.

Nonconforming conditions of use, structures, and sites in Downtown are treated differently per LUC 20.25A.040. In this instance, FANA wants to utilize available Phase 2 FAR, a measure of development intensity based on the size of the Phase 2 *site*. Nonconforming site is defined as “A lot which does not conform to site development regulations ... of the district in which it is located due to changes in Code requirements, condemnation or annexation.” LUC 20.50.036. As such, the proper section of LUC 20.25A.040 is C, Nonconforming Sites, and the *site* development conditions, such as “landscaping, parking, fence, driveway, street opening, pedestrian amenity, screening and curb cut regulations,” for Phase 2 are those that must be brought into conformance. LUC 20.50.036.

In their existing state, both Phase 1 and Phase 2 sites are nonconforming sites because both sites were developed under a previous version of the LUC. FANA already plans to fully develop Phase 1 in conformance with the current code. Additionally, FANA wants to modify the utilization and development intensity of the nonconforming Phase 2 site at the same time as it is developing Phase 1. To accomplish such a fundamental change to the entire Phase 2 site, FANA is required to bring the Phase 2 site nonconformities into conformance per LUC 20.25A.040.C.

In its interpretation request, FANA argues that the LUC does not require a future phase to be brought into conformance ahead of the actual development of the future phase. FANA’s argument would be sound if FANA was not actually proposing to utilize the FAR from, and thereby develop, the Phase 2 site. This intended development of Phase 2 constitutes a fundamental change to this site, which requires bringing all Phase 2 site nonconformities into conformance at the time this change occurs.

3. Conformance with the Current Code at the Time of Development and Change Aligns with the City’s Regulatory Framework, Goals and Policies.

Bringing site nonconformities into conformance when such site is developed aligns with the City’s regulatory framework, goals, and policies. While “nonconformities are allowed to continue indefinitely if there is no change to the use, structure, or site,” nonconformities are detrimental to public interests. *Rhod-A-Zalea & 35th, Inc.*, 136 Wn.2d at 7, 959 P.2d 1024.

The City's Comprehensive Plan includes goals and policies that encourage development within the City and especially in Downtown. For Downtown, the City wants to create "a great place for people" that is viable, livable, memorable, and accessible and "the symbolic and functional heart of the Eastside Region through the continued location of cultural, commercial, entertainment, residential, and regional uses." Comprehensive Plan, Downtown Goals. Also, several Downtown policies encourage livability, aesthetically attractive development, creation of pedestrian environment with a sense of activity, enclosure and protection and connected open spaces, among others. Comprehensive Plan, Downtown Subarea Plan, Goals; Policies, S-DT-1, S-DT-3, S-DT-6, S-DT-35, S-DT-37, S-DT-54, S-DT-55, S-DT-104.

Furthermore, the City's Land Use Policies "direct most of the city's growth to the Downtown regional growth center" and emphasize "aesthetics and community compatibility...[through] circulation, landscaping, open space, storm drainage, utilities, and building location and design in the master plan...[and] development of amenities, services and facilities that are supportive of all types of families through investment, incentives and development regulations." Comprehensive Plan, Land Use Policies LU-1, LU-29, LU-31.

Consistent with these goals and policies, the City's nonconforming regulations balance the ability to retain a nonconformity indefinitely with thresholds for when conformance remedies would be required. As cited on multiple occasions above, LUC 20.25A.040 govern nonconforming conditions in Downtown. Per LUC 20.25A.040, in order for FANA to utilize its nonconforming Phase 2 FAR for its Phase 1 development, and thereby fundamentally changing the entire Phase 2 site, FANA must bring Phase 2 site nonconformities into conformance with the current and applicable code.

D. Conclusion.

FANA's intended utilization of Phase 2 site's available FAR is *development* of that site under the LUC. Such development of Phase 2 is a fundamental change to the entirety of the Phase 2 site. A nonconforming site in Downtown may be changed only if the change conforms to the requirements of the applicable code. LUC 20.25A.040.C. Therefore, this *development* of the entire Phase 2 site requires that FANA bring all Phase 2 site nonconformities into conformance at the time this fundamental change occurs.

III. FACTORS FOR CONSIDERATION

In making an interpretation of the provisions of the LUC, the Director shall take the following factors into consideration. LUC 20.30K.140.

A. Applicable Provisions of the Land Use Code.

The applicable LUC provisions considered in this Interpretation include the following:

1. Part 20.25A LUC—Downtown
 - LUC 20.25A.020—Definitions (DT – Floor Area Ratio (FAR), DT – Project Limit, DT – Site)

- LUC 20.25A.040—Nonconforming uses, structures and sites
- 2. Chapter 20.50 LUC—Definitions
 - LUC 20.50.016—D definitions (Development)
 - LUC 20.50.036—N definitions (Nonconforming, Nonconforming Site, Nonconforming Structure, Nonconforming Use)
- 3. Part 20.30K LUC—Interpretation of the Land Use Code

B. The Impact of the Interpretation on other Provisions of the LUC.

This Interpretation does not impact other provisions of the LUC.

C. The Implications of the Interpretation for Development within the City as a whole.

This Interpretation impacts the FANA MDP and other similarly situated properties/projects in Downtown.

D. Applicable Provisions of the Comprehensive Plan and other Relevant Codes and Policies.

This interpretation is consistent with the City's Comprehensive Plan Land Use and Downtown Goals and Policies and Relevant Codes, specifically and including:

Land Use Element Goal: To develop and maintain a land use pattern that protects natural systems and retains trees and open space; maintains and strengthens the vitality, quality and character of Bellevue's neighborhoods; and focuses development activity in Downtown and other commercial and residential centers.

Land Use Policies:

LU-1. Promote a clear strategy for focusing the city's growth and development as follows:

- 1. Direct most of the city's growth to the Downtown regional growth center and to other areas designated for compact, mixed use development served by a full range of transportation options.

...

LU-20. Support Downtown's development as a regional growth center, with the density, mix of uses and amenities, and infrastructure that maintain it as the financial, retail, transportation, and business hub of the Eastside.

LU-27. Encourage the master planning of multi-building and multi-parcel developments and large institutions to emphasize aesthetics and community compatibility. Include circulation, landscaping, open space, storm drainage, utilities, and building location and design in the master plan.

LU-31. Encourage development of amenities, services and facilities that are supportive of all types of families through investment, incentives and development regulations.

Downtown Goals:

The Great Place Strategy: To be a great place for people, Downtown Bellevue must be viable, livable, memorable, and accessible. As the heart of the Eastside, Downtown Bellevue has cultural, commercial, entertainment, residential, and regional uses located in distinct, mixed-use neighborhoods connected by a variety of unique public places, great public infrastructure, and accessible mobility options.

General Goal: To become the symbolic and functional heart of the Eastside Region through the continued location of cultural, commercial, entertainment, residential, and regional uses.

Urban Design Goal: To develop a functional and aesthetically pleasing Downtown which creates a livable and highly pedestrian-oriented urban environment that is compatible with adjacent neighborhoods.

Downtown Policies:

S-DT-1. Emphasis shall be placed on Downtown livability, with provisions made for the needs, activities, and interests of Downtown residents, employees, shoppers, and visitors.

S-DT-3. Develop Downtown as an aesthetically attractive area.

S-DT-6. Develop Downtown as the Eastside's most concentrated and diverse regional retail district.

S-DT-35. Create a pedestrian environment with a sense of activity, enclosure, and protection.

S-DT-37. Link building intensity to design guidelines relating to building appearance, amenities, pedestrian orientation and connections, impact on adjacent properties, and maintenance of view corridors. These guidelines will seek to enhance the appearance, image, and design character of the Downtown.

S-DT-54. Provide incentives to reinforce unique characteristics of Downtown Districts to create pedestrian-scaled, diverse, and unique urban lifestyle experiences and options.

S-DT-55. Utilize design guidelines to help differentiate development within each of the Downtown Districts as they evolve over time.

S-DT-104. Require developer contributions for a coordinated system of major and minor public open spaces along the pedestrian corridor and at designated intersections. These could include areas for seating, fountains, courtyards, gardens, places to eat, and public art.

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IV. EFFECT OF INTERPRETATION

Pursuant to LUC 20.30K.150, an interpretation of any LUC provision issued under Chapter 20.30K LUC shall have the same effect as any provision of the LUC. An interpretation of the LUC remains in effect until or if rescinded in writing by the Director. LUC 20.30K.155.

V. APPEAL

An Interpretation of the LUC under Chapter 20.35.015 is a Process II administrative land use decision made by the Director. Pursuant to LUC 20.35.250, Process II decisions may be appealed to the Hearing Examiner by providing a written statement of appeal and the appeal notification form to the City Clerk not later than 5:00 p.m. on the 14th day following the date of publication of the decision of the Director.